4-8-2015

State v. Smith Respondent's Brief Dckt. 42090

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 42090
Plaintiff-Respondent,	)	
	)	Bonner Co. Case No.
vs.	)	CR-2012-5464
	)	
LAURA L. SMITH,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

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STATEMENT OF THE CASE

Nature Of The Case

Laura L. Smith appeals from the judgment entered upon the jury verdict finding her guilty of aiding and abetting delivery of a controlled substance - psilocybin/psilocin mushrooms.

Statement Of The Facts And Course Of The Proceedings

Detectives Clinton Mattingley and Shane Hight were working undercover arranging drug sales at a bar in Oldtown. (Trial Tr., p.69, L.18 – p.70, L.14.) One of the contacts they made during that investigation was with Shawn Kendle. (Trial Tr., p.72, Ls.18-23.) The detectives received information that Kendle was "either dealing in controlled substances or facilitating the middle man in controlled substances." (Trial Tr., p.72, L.23 – p.73, L.1.) In May 2012, the detectives met with Kendle at a bar to negotiate a marijuana sale, however, they could not agree on the terms of that deal. (Trial Tr., p.73, L.2 – p.75, L.2.) As an alternative, Kendle offered to arrange a sale for psilocybin mushrooms and indicated there was a woman in the bar who could facilitate the purchase. (Trial Tr., p.76, L.7 – p.77, L.6.) Once they agreed to buy the mushrooms, Kendle went inside the bar and spoke to a female who was later identified as Smith. (Trial Tr., p.80, Ls.14, p.81, Ls.3-14.) After speaking with Kendle, Smith left and returned approximately 10 minutes later with a brown paper sack, which she placed in Kendle's truck. (Trial Tr., p.82, L.8 – p.87, L.19; State's Exhibit 1, Track B.) Smith then went back inside the bar. (Trial Tr., p.87, Ls.19-20.)

After Smith went back in the bar, Detective Mattingley waited a few minutes and also went inside and rejoined Detective Hight. (Trial Tr., p.89, Ls.7-24.) Kendle came over, sat with them, and suggested they go outside to look at the detectives' motorcycles. (Trial Tr., p.89, L.24 – p.90, L.5.) The three men left together and, once outside, Kendle provided them with the mushrooms, which were in the brown paper sack Detective Mattingley saw Smith carrying through the parking lot to Kendle's truck. (Trial Tr., p.92, L.10 – p.93, L.6; State's Exhibit 1, Track C.) Detective Mattingley captured the events with a video recording device that was attached to his "chest area." (Trial Tr., p.75, Ls.12-18; State's Exhibit 1, Tracks A, B, C.)

The state charged Smith with aiding and abetting Kendle in the delivery of a controlled substance – psilocybin/psilocin mushrooms. (R., pp.62-63.) Smith pled not guilty and proceeded to trial at which a jury found her guilty. (R., pp.75-77, 114-130, 132.) The court imposed a unified four-year sentence with two years fixed, but suspended the sentence and placed Smith on probation for three years. (R., pp.146-149.) Smith filed a timely notice of appeal. (R., pp.159-160.)

ISSUES

Smith states the issues on appeal as:

> 1. Was Ms. Smith's right to confront witnesses violated when the district court allowed the jury to hear recorded statements of an individual who did not testify at trial, and did the district court erroneously allow hearsay statements to be admitted into evidence?
>
> 2. Was there insufficient information [sic] to support the conviction in this case?

(Appellant's Brief, p.5.)

The state rephrases the issues as:

1. Because statements made to members of law enforcement during the course of an undercover drug buy are not testimonial for purposes of the Confrontation Clause, has Smith failed to show the district court erred in overruling her objection to Kendle's statement about her presence in the bar? Has Smith likewise failed to establish error in the district court's decision to admit the same statement over Smith's hearsay objection? Finally, even if the court erred in admitting the challenged statement, is any error harmless?

2. Did the state present sufficient evidence from which the jury could conclude, beyond a reasonable doubt, that Smith was guilty of aiding and abetting the delivery of a controlled substance?

ARGUMENT

I.
Smith Has Failed To Show The District Court Erred In Admitting Kendle's Statement, "I've Got Her In The Bar," Because The Statement Was Not Testimonial For Purposes Of The Confrontation Clause Nor Was It Inadmissible Hearsay

A. Introduction

Smith contends the district court "violated her constitutional rights to confront witnesses" by allowing the admission of the recording of the interaction between Kendle and Detective Mattingley. (Appellant's Brief, p.6.) Smith further asserts that admission of the recording was erroneous because it contained "hearsay evidence as to the statements by Mr. Kendle." (Appellant's Brief, p.6.) The only statement Smith specifically challenges is Kendle's statement, "I've got her in the bar." (Appellant's Brief, p.9.) Admission of this statement did not violate Smith's right to confrontation because the statement was not testimonial. Smith has also failed to show error in the admission of the statement over her hearsay objection because the statement was not offered for the truth of the matter asserted, but was offered to show the context and genesis of the drug transaction at issue. Even if this Court finds Smith has met her burden of showing error in relation to the admission of the challenged statement, any error is harmless.

B. Standard Of Review

When reviewing a claimed violation of the Confrontation Clause the appellate court defers to the trial court's factual findings unless clearly erroneous,

but gives free review to the trial court's legal determinations. State v. Hooper, 145 Idaho 139, 141, 176 P.3d 911, 913 (2007).

The trial court has broad discretion in the admission of evidence, and its judgment will be reversed only when there has been a clear abuse of discretion. State v. Perry, 150 Idaho 209, 218, 245 P.3d 961, 970 (2010) (citations omitted). With respect to the admission of hearsay, the appellate court determines "whether the district court recognized that it did not have discretion to admit the hearsay evidence if the requirements for an exception were not met; whether it acted consistently with the rules governing hearsay exceptions; and whether it reached its decision to admit the hearsay by an exercise of reason." State v. Watkins, 148 Idaho 418, 423, 224 P.3d 485, 490 (2009).

C. Kendle's Statement Was Not Testimonial, Therefore, Its Admission Did Not Violate The Confrontation Clause

Smith contends the admission of the "video/audio recording" of Detective Mattingley's interactions with Kendle violated "her constitutional rights to confront witnesses." [1] (Appellant's Brief, p.6.) The recording to which Smith refers was

[1] Smith contends the admission of Kendle's statements violated her rights under both the United States and Idaho Constitutions, and contends Article I, § 13 of the Idaho Constitution "affords criminal defendants the right to confront adverse witnesses" and that the state constitutional provision is "coextensive with the Sixth Amendment's Confrontation Clause." (Appellant's Brief, pp.6-7 (citing State v. Sharp, 101 Idaho 498, 502, 616 P.2d 1034, 1038 (1980), and State v. Mantz, 148 Idaho 303, 305 n.1, *** (Ct. App. 2009).) This assertion is incorrect. While Article I, § 13 of the Idaho Constitution affords the right to "compel the attendance of witnesses," it says nothing about the right to confront witnesses. Nor do the cases Smith cites support her claim that the "confrontation right provided for under the Idaho Constitution is coextensive with the Sixth Amendment's Confrontation Clause." (Appellant's Brief, p.7.) Rather, those cases expressly state that "Idaho's Constitution does not contain a confrontation

admitted as State's Exhibit 1. On the day of trial, Smith objected to the audio portion of the recording. (Trial Tr., p.25 – p.12, L.6.) Smith argued that her objection was that she did not have "an opportunity to cross examine [Kendle] about what he's saying and it's almost impossible to hear most of the time what he is saying." (Trial Tr., p.13, Ls.13-17.) Smith also complained that "discussions about pot" were irrelevant, prejudicial "404(b) material." (Trial Tr., p.6, Ls.6-16.) The trial court agreed that the audio was very difficult to understand but decided it would "admit the video starting at 1730" given Smith's objection "to talking about drug deals." (Trial Tr., p.6, Ls.4-5, p.8, L.10, p.9, Ls.3-16, p.13, L.22 – p.14, L.1, p.15, Ls.1-2.)

Following jury selection, the prosecutor sought to clarify what the detectives could testify about in relation to the video, indicating his belief that the court ruled that the jury would not be allowed to hear the audio when viewing the video. (Trial Tr., p.53, L.21 – p.54, L.21.) The following exchange then occurred:

> [DEFENSE COUNSEL]: Judge, I have no idea what he's talking about.
>
> THE COURT: Hold it. First of all, I think there was a misunderstanding. You can play the audio. We just can't hear it.
>
> [PROSECUTOR]: Well, I think [defense counsel] was --
>
> [DEFENSE COUNSEL]: Judge, my objection was to that early material.

---

clause equivalent to that of the United States Constitution." Sharp, 101 Idaho at 502, 616 P.2d at 1038; Mantz, 148 Idaho at 305 n.1, 222 P.3d at 473 n.1 (quoting Sharp). The Idaho Supreme Court recently reiterated this point in State v. Stanfield, 2015 WL 1452930 *3 (Idaho April 1, 2015) ("Our state constitution does not contain a confrontation clause similar to that found in the United States Constitution; therefore, this issue is analyzed solely under the United States Constitution.").

THE COURT: Right.

[DEFENSE COUNSEL]: Where they're standing there and you can't make out and all you hear is the road noise and [sic] very difficult to hear and a lot of the discussion is about marijuana that I could hear.

THE COURT: Right. And I --

[DEFENSE COUNSEL]: That's my --

THE COURT: And I think I said we're gonna start at 1730 which pretty much eliminated all that was right before the statement you wanted.

[PROSECUTOR]: So we would be able to go ahead and play the audio for the jury.

THE COURT: Yes.

(Trial Tr., p.54, L.22 – p.55, L.24.)

During trial, when the prosecutor was ready to play the video, defense counsel stated: "Judge, for the record I would just maintain my earlier objection to this[.]" (Trial Tr., p.78, Ls.9-11.) As the video played, Detective Mattingley explained what was shown. (Trial Tr., p.79, L.12 – p.80, L.19.) Included as part of Detective Mattingley's narration was the following: "This is after we've come back. Both of us have -- all three of us have come back into the bar. The gentlemen standing with his back in the green t-shirt to us is Mr. Kendle. He is standing at the bar talking to what he said was his person that could supply him with mushrooms." (Trial Tr., p.80, Ls.14-19.) At this point, Smith objected based

on the "right of confrontation" and hearsay.[2] (Trial Tr., p.80, Ls.20-23.) The court overruled the objection. (Trial Tr., p.80, L.24.)

Smith first argues Kendle's statements "as heard in the video recording, were testimonial in nature as they were elicited solely for purposes of criminal investigation and prosecution" and, therefore, admission of the statements violated her confrontation rights. (Appellant's Brief, p.8.) Smith, however, identifies only a single statement for purposes of her analysis. (See generally Appellant's Brief, pp.8-9.) That statement is: "I've got her in the bar." (Appellant's Brief, p.9.) Given the nature and scope of the objection in the district court, and because it is Smith's burden to show error, this Court's review should be limited to review of this single statement. Akers v. D.L. White Const., Inc., 156 Idaho 37, 320 P.3d 428 (2014) (quotations and citations omitted) ("[T]his Court does not search the record for error, and the party alleging error has the burden of showing it in the record."); State v. Hansen, 154 Idaho 882, 886, 303 P.3d 241, 245 (Ct. App. 2013) (citation omitted) ("Generally, issues not raised below may not be considered for the first time on appeal."). Further, this Court should conclude that admission of Kendle's statement, "I've got her in the bar," did not violate Smith's confrontation rights.

The Confrontation Clause prevents the government from using evidence of out-of-court testimonial statements unless the declarant is unavailable and the defendant has had the prior opportunity for cross-examination. Crawford v.

[2] Notably, Smith did not object when Detective Mattingley earlier testified, "Mr. Kendle says I've got her in the bar right now, the person to talk to." (Trial Tr., p.77, Ls.9-10.)

Washington, 541 U.S. 36, 59 (2004); State v. Shackelford, 155 Idaho 454, 460, 314 P.3d 136, 143 (2013). "The Confrontation Clause only applies to statements that are 'testimonial.'" Stanfield, 2015 WL 1452930 *4 (citing Davis v. Washington, 547 U.S. 813, 823 (2006); Crawford, 541 U.S. at 51). It "does not bar statements not offered to prove the truth of the matter asserted." Stanfield at *4 (citing Crawford, 541 U.S. at 59 n.9). Although the United States Supreme Court "has not provided a comprehensive definition of 'testimonial,'" the Idaho Supreme Court has "gleaned" certain "guiding principles" from Supreme Court decisions. Stanfield at *4. The Idaho Supreme Court summarized those principles as follows:

> Whether a statement is testimonial is determined by looking at the statement's primary purpose and its similarities to traditional testimony. *Davis*, 547 U.S. at 822. Testimony is defined as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford,* 541 U.S. at 51 (alteration in original; citation omitted). Therefore, a statement is testimonial when "the circumstances objectively indicate that . . . the primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. When no such primary purpose exists, the statement is nontestimonial and its admissibility is governed by state and federal rules of evidence, not the Confrontation Clause. *Michigan v. Bryant*, 562 U.S. 344, ___, 131 S.Ct. 1143, 1155 (2011).
>
> Further, while a statement does not have to be written or made under oath to be testimonial, the formality of the statement itself and the formality of the circumstances in which the statement is made are relevant to determine whether it was intended to establish some fact at trial. *Davis*, 547 U.S. at 826, 827-27, *see, e.g.*, *Shackelford*, 150 Idaho at 373, 247 P.3d at 600 (the totality of the circumstances analysis considers "the formality of questioning and the extent to which the interview was similar to live testimony"). In essence, a statement is testimonial when it is intended to be "a weaker substitute for live testimony at trial." *Davis*, 547 U.S. at 828 (internal quotation, citation omitted).

Stanfield at *4 (ellipses original; footnote omitted).

In short, "for a statement . . . to be deemed testimonial, it must have been made with a primary objective of creating an evidentiary record to establish or prove a fact at trial." Stanfield at *9 (citing Michigan v. Bryant, 131 S.Ct. 1143, 1155 (2011) and Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009)). Smith correctly notes this requirement but fails to actually apply it to the statement she challenges. (Appellant's Brief, pp.8-9.) Rather than analyzing whether the statement was "*made* with a primary objective of creating an evidentiary record to establish or prove a fact at trial," Stanfield, supra (emphasis added), Smith claims the statement was testimonial because it was "*elicited* solely for purposes of criminal investigation and prosecution." (Appellant's Brief, p.9 (emphasis added).) The primary purpose test relates to the reason the statement was made, not law enforcement's motive in eliciting the statement.[3] In

[3] This is not to say that police questioning is irrelevant to the inquiry for purposes of deciding whether a statement is testimonial. Indeed, the Supreme Court in Crawford said that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." 541 U.S. at 52. However, because the statements Kendle made during the course of the undercover drug buy were not the result of any "interrogation" by law enforcement under any conceivable definition, the police interrogation principle from Crawford has no application here. See Crawford, 541 U.S. at 53 n.4 ("Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case. Sylvia's recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition."); compare Davis, 547 U.S. at 822 (statements are nontestimonial if made in response to questioning "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" but are testimonial if the primary purpose of the questioning "is to establish or prove past events potentially relevant to later criminal prosecution"). Rather, the analysis must center on the primary purpose of Kendle's statements. See Davis, 547 U.S. at 822 n.1 ("[E]ven when interrogation exists, it is in the final analysis

this case, the primary purpose of Kendle's statement was to facilitate a drug sale, not to provide evidence of a crime that the state could use in a later criminal prosecution. Indeed, that purpose was undoubtedly the polar opposite of what Kendle intended. The Fifth Circuit's opinion in Brown v. Epps, 686 F.3d 281 (5th Cir. 2012), illustrates this point.

Echols, a confidential informant, made contact with certain individuals for purposes of making a drug deal. Brown, 686 F.3d at 283. With the assistance of law enforcement, Echols' interactions with these individuals were recorded, including the drug sale. Id. at 283-284. These recordings were subsequently introduced in the criminal prosecution against Brown who was one of the individuals involved in the sale. Id. at 284. Evaluating the Confrontation Clause challenge to the admission of those recordings, the Fifth Circuit concluded the statements on the recordings were not testimonial. The court explained:

> No controlling authority specifies whether an unidentified declarant's statements to an undercover officer or confidential informant prior to an arrest are testimonial, but persuasive authorities all point in the same direction. In *Davis*, the Supreme Court observed in dicta that statements made unwittingly to a government informant were "clearly nontestimonial." [547 U.S. at 825.] In an unpublished decision, *United States v. Vasquez*, this Court relied on the Supreme Court's observation in *Davis* to conclude that an unindicted coconspirator's statements made unwittingly to an undercover officer were not testimonial because there was nothing in the record to suggest that the coconspirator was aware that his conversations were being recorded. [234 Fed.Appx. at 314.] Likewise, relying on *Crawford*, *Davis*, and *Vasquez*, several district courts in this Circuit have held that statements unknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements "are not made under circumstances which

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the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.").

> would lead an objective witness to reasonably believe that the statements would be available for later use at trial." [Citing cases.] Many other circuits have come to the same conclusion, and none disagree. [Citing cases.] In sum, courts that have addressed similar questions would probably agree that the phone conversations in this case were nontestimonial.

686 F.3d at 287-288 (footnotes omitted).

Applying the foregoing principles to the facts before it, the court reasoned:

> Even if the Supreme Court has not comprehensively demarcated "testimonial statements," every indicator that the Court has ascribed to them do not apply to the statements at issue here. The conversations did not consist of solemn declarations made for the purpose of establishing some fact. Rather, the exchange was casual, often profane, and served the purpose of selling cocaine. Nor were the unidentified individuals' statements made under circumstances that would lead an objective witness reasonably to believe that they would be available for use at a later trial. To the contrary, the statements were furthering a criminal enterprise; a future trial was the last thing the declarants were anticipating. Moreover, they were unaware that their conversations were being preserved, so they could not have predicted that their statements might subsequently become "available" at trial. The unidentified individuals' statements were obviously not "prior testimony at a preliminary hearing, before a grand jury, or at a former trial." They also were not part of a formal interrogation about past events—the conversations were informal cell-phone exchanges about future plans—and their primary purpose was to create an out-of-court substitute for trial testimony. Applying to this case an image from Justice Scalia's majority opinion in *Davis*, "[n]o 'witness' goes into court to proclaim" that he will sell you crack cocaine in a Wal-Mart parking lot. An "objective analysis" would conclude that the "primary purpose" of the unidentified individuals' statements was to arrange the drug deal. Their purpose was "not to create a record for trial and thus is not within the scope of the [Confrontation] Clause."

Brown, 686 F.3d at 288 (footnotes and citations omitted).

State courts have also concluded that statements made to undercover officers are not testimonial for purposes of the Confrontation Clause. See, e.g., Helms v. State, 38 So.3d 182, 187 (Fla. Dist. Ct. App. 2010) (rejecting

Confrontation Clause claim because it could not "be said that a reasonable person, placed in the escort's position at the time the audiotape was made, would have anticipated the statements would later be used for prosecutorial purposes" and noting escort did not know she was speaking to an undercover officer or know that the conversation was being recorded); People v. Redeaux, 823 N.E.2d 268, 271 (Ill. App. Ct. 2005) (rejecting Confrontation Clause claim because "nothing in the conversations between Osorio and Johns even came close to 'structured police questioning'" but instead they were "merely trying to arrange the details of a drug transaction"). Consistent with the foregoing authorities, this Court should conclude that Kendle's statement to the detectives during the course of the undercover drug buy were not testimonial.

It is readily apparent that Kendle was unaware that Detective Mattingley was an undercover officer. Rather, as in Brown, Kendle was engaged in a casual conversation for the purpose of selling drugs. The primary purpose of what he said was to arrange a drug deal, not to create a record for trial. Accordingly, Kendle's statement, "I've got her in the bar," was not subject to exclusion based on the Confrontation Clause.[4]

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[4] Because Kendle's statement was not testimonial, the Court need not address whether Kendle was unavailable or whether there was a prior opportunity to cross-examine him. Stanfield at *3 ("The Confrontation Clause only applies to statements that are 'testimonial.'"). The state does not dispute that the prosecutor did not call Kendle as a witness at the preliminary hearing and, as such, Smith did not have the opportunity to cross-examine him at that time. (R., pp.64-72 (court minutes of preliminary hearing).) The state does, however, dispute Smith's claim that Kendle was not unavailable at the time of trial. The record reflects that Kendle would not testify at Smith's trial based on his constitutional right not to incriminate himself. (1/13/2014 Tr., p.4, Ls.15-17 (Kendle's attorney indicating Kendle "does not want to testify"), p.5, Ls.19-21

D. Because Kendle's Statement Was Admissible For The Non-Hearsay Purpose Of Providing Context For And The Genesis Of The Drug Transaction At Issue, Smith Has Failed To Show The District Court Erred In Overruling Her Hearsay Objection

In addition to claiming Kendle's statement, "I've got her in the bar" was inadmissible based on the Confrontation Clause, Smith also contends the statement was hearsay and should have been excluded on this basis. (Appellant's Brief, pp.12-13.) This claim also fails.

Hearsay is evidence of an out-of-court statement "offered in evidence to prove the truth of the matter asserted." I.R.E. 801(c). Out-of-court statements intended not to prove the truth of the matter asserted, but instead offered merely to provide context, are not hearsay. See, e.g., State v. Seigel, 137 Idaho 538, 540, 50 P.3d 1033, 1035 (Ct. App. 2002) (evidence that witness confronted defendant with out-of-court statements of sexual misconduct not hearsay because offered "to provide context" to admissions thereby elicited). A party claiming a non-hearsay purpose "must identify a non-hearsay purpose that has relevance to prove or disprove a fact that is of consequence to the determination of the action." State v. Davis, 155 216, 219, 307 P.3d 1242, 1246 (Ct. App. 2013).

(Kendle's attorney representing that she would advise Kendle not to testify unless "something changes and he enters a plea or something"); see also Trial Tr., p.14, Ls.19-23 (Smith's attorney referencing prior discussion regarding Kendle's unwillingness to testify and impropriety of calling him as a witness knowing he would assert his right not to testify).) Smith cites no authority for the proposition that more was required to establish Kendle's unavailability. (See generally Appellant's Brief, pp.10-11.)

In this case, the prosecutor identified a non-hearsay purpose for evidence of the statements made in the drug negotiation that culminated in the sale of mushrooms to undercover detectives. (Trial Tr., p.5, L. 14 – p.15, L.2 (addressing admissibility of the audio part of the recording of the drug deal).) Specifically, the prosecutor argued that the undercover detectives were engaged in a negotiation with Kendle for marijuana. (Trial Tr., p.10, Ls.9-13.) When the marijuana buy failed, the negotiations turned to mushrooms. (Trial Tr., p.10, Ls.12-14.) Kendle did not ordinarily deal in mushrooms, but stated he could obtain them from someone "in the bar." (Trial Tr., p.10, Ls.15-18.) After Kendle and the detectives re-entered the bar, Kendle made contact with Smith. (Trial Tr., p.10, Ls.19-22.) Evidence of the statements made in negotiations between Kendle and the undercover detectives that ultimately resulted in the sale of mushrooms was admissible for the context of showing the genesis of the crime and how Smith was ultimately included in it. (Trial Tr., p.10, Ls.6-9.)

This non-hearsay purpose was proper, and was within the trial court's discretion to accept. Taken literally, the truth of the matter asserted, "I've got her in the bar," proves only Smith's location at that time—a fact of little utility to the state considering that there was overwhelming evidence that Kendle and the detectives went into the bar and Kendle contacted Smith there. The entire conversation, however, shows that Kendle and the undercover detectives made an arrangement for the sale of mushrooms that involved Kendle obtaining those mushrooms from a third party. Because the negotiations between the undercover detectives and Kendle were important context for the crime, and

were proffered for context and not the truth of the matter asserted, the district court properly overruled Smith's hearsay objection. Smith has failed to show otherwise.

E. Even If The District Court Erred In Allowing The Admission Of Kendle's Statement, Any Error Is Harmless

Even if the district court erred in allowing the admission of Kendle's statement, "I've got her in the bar," any error was harmless. Idaho Criminal Rule 52 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." I.C.R. 52. The inquiry is whether "'the guilty verdict actually rendered in this trial was surely unattributable to the error.'" State v. Joy, 155 Idaho 1, 11, 304 P.3d 276, 286 (2013) (quoting Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (emphasis omitted)).

The guilty verdict entered against Smith in this case was surely unattributable to the single statement about which Smith complains. That Smith facilitated the sale of mushrooms between Kendle and the detectives is readily apparent from what Detective Mattingley captured on video and testified to at trial. Immediately after agreeing to the drug sale, Kendle re-entered the bar and made contact with Smith who then left and returned within a few minutes with a paper sack that she placed in Kendle's truck, which Kendle later gave to the detectives. That sack contained psilocybin/psilocin mushrooms. If the state had proceeded to trial based on its original misunderstanding of the district court's evidentiary ruling – that it could play the video without audio – the jury still would have convicted Smith because it depicts Smith's role in the commission of the

crime. Any error in the admission of Kendle's statement regarding Smith's presence in the bar is, therefore, harmless.

II.

Smith Has Failed To Show The Evidence Was Not Sufficient To Support Her Conviction For Aiding And Abetting The Delivery Of A Controlled Substance

A. Introduction

Smith contends the state failed to present sufficient evidence to support her conviction for aiding and abetting Kendle in the delivery of a controlled substance. (Appellant's Brief, pp.13-17.) According to Smith, "At most . . . the State demonstrated mere presence or proximity to the alleged crimes [sic], which is insufficient to support her conviction." (Appellant's Brief, p.13.) Smith's argument fails. Application of the correct legal standards to the evidence presented shows the state presented sufficient evidence from which the jury could find, beyond a reasonable doubt, that Smith was guilty of aiding and abetting Kendle in the delivery of psilocybin/psilocin mushrooms.

B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). In conducting this review the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the

reasonable inferences to be drawn from the evidence. State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); Hart, 112 Idaho at 761, 735 P.2d at 1072. Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of upholding the jury's verdict. State v. Hughes, 130 Idaho 698, 701, 946 P.2d 1338, 1341 (Ct. App. 1997); Hart, 112 Idaho at 761, 735 P.2d at 1072.

C. The State Presented Sufficient Evidence To Prove Smith Aided And Abetted Kendle In The Delivery Of Psilocybin/Psilocin Mushrooms

Smith contends the evidence presented against her "merely shows [her] proximity to criminal activity," not that she actually committed the crime alleged and which the jury determined the state proved beyond a reasonable doubt. (Appellant's Brief, p.14.) In support of this argument, Smith details the evidence presented "[e]xcepting the improperly admitted evidence of what Mr. Kendle said" as asserted in her first argument on appeal. (Appellant's Brief, p.14 and n.4.) Smith's insufficient evidence claim fails for two reasons.

First, Smith has applied the incorrect legal standard for reviewing the sufficiency of the evidence. When an appellate court reviews the sufficiency of the evidence to support the jury's verdict it does not exclude consideration of evidence that may have been improperly admitted. Rather, the appellate court considers all evidence admitted at trial without "excepting" any evidence it may determine should have been excluded. State v. Moore, 148 Idaho 887, 893, 231

P.3d 532, 538 (Ct. App. 2010). Smith's argument relying on a contrary legal principle fails.[5]

Second, Smith's argument fails based on the elements the state was required to prove and the evidence presented in support of those elements. The court instructed the jury that in order to find Smith guilty of the charged offense, the state must prove, beyond a reasonable doubt that:

> 1. On or about the 16th day of May, 2012;
>
> 2. in the State of Idaho, County of Bonner;
>
> 3. the defendant, Laura Lee Smith, delivered, or aided and abetted in delivering, any amount of Psilocybin/Psilocyn Mushrooms, a Schedule I non-narcotic controlled substance, to another, and
>
> 4. the defendant either knew it was Psilocybin/Psilocyn Mushrooms or believed it was a controlled substance.

(Instruction No. 13.)

The court further instructed the jury on the definition of the term "deliver," and the meaning of aiding and abetting. (Instructions No. 14, 16.) Additionally, the court instructed the jury that psilocybin/psilocin mushrooms are a Schedule I non-narcotic controlled substance. (Instruction No. 15.)

The state presented ample evidence to support the jury's finding of guilt. After Detectives Mattingley and Hight arranged the purchase through Kendle, Kendle went back inside the bar and made contact with Smith. (Trial Tr., p.76, L.22 – p.80, L.19; State's Exhibit 1, Tracks A and B.) Shortly thereafter, Smith

[5] That said, even without Kendle's challenged statement, for the reasons set forth in Section I.E., supra, the evidence presented was still sufficient to support the jury's verdict.

left the bar. (Trial Tr., p.81, L.3 – p.82, L.15; State's Exhibit 1, Track B.) Smith returned after approximately ten minutes and Detective Mattingley recorded her getting out of her car carrying a brown paper sack. (Trial Tr., p.82, L.20 – p.87, L.14.) Smith walked across the parking lot to the driver's side of Kendle's truck. (Trial Tr., p.87, Ls.12-14.) Detective Mattingley heard Kendle's truck door open and close and then Smith went back in the bar and was no longer carrying the paper sack. (Trial Tr., p.87, Ls.12-21.) After two minutes, Detective Mattingley also went back in the bar and made contact with Detective Hight and Kendle at which time Kendle suggested the three go outside. (Trial Tr., p.87, L.21 – p.90, L.5.) Once outside, Kendle provided the detectives with the brown paper sack which can be seen on the video sitting on the floor board of Kendle's truck on the driver's side. (Trial Tr., p.90, L.6 – p.93, L.4.) The mushrooms that were the subject of the sale were inside that sack. (Trial Tr., p.93, Ls.1-3.) Those mushrooms tested positive for psilocin or psilocybin. (Trial Tr., p.159, Ls.9-23.)

In claiming the evidence was insufficient, Smith notes Kendle's truck was never searched for other sacks, the lack of direct evidence that Smith knew the sack she was carrying contained illegal mushrooms, the fact that the sack was not fingerprinted, and that Smith was "never caught with any of the buy money." (Appellant's Brief,pp.14-15.) None of this, however, shows the evidence was insufficient. The state was not required to fingerprint the sack or "catch" Smith with "buy money" in order to establish she participated in the delivery of the mushrooms. Although the evidence may have been circumstantial, it was more than sufficient to support the jury's verdict. State v. Abdullah, 2015 WL 856787

*28 (March 2, 2015) (quoting State v. Severson, 147 Idaho 694, 712, 215 P.3d 414, 432 (2009) ("[E]ven when circumstantial evidence could be interpreted consistently with a finding of innocence, it will be sufficient to uphold a guilty verdict when it also gives rise to reasonable inferences of guilt."). Further, it is well-established that the jury could infer Smith's intent from her conduct. State v. Elias, 157 Idaho 511, ___, 337 P.3d 670, 674 (2014) (citations omitted).

Smith's claim that "there is no evidence that she delivered mushrooms to Mr. Kendle, or facilitated the delivery in any way," but that the only "evidence in this case is that [she] was present in the bar" is contradicted by Detective Mattingley's testimony and the video recordings of Smith's actions on the date of the delivery. Smith's sufficiency of the evidence claim fails.

CONCLUSION

The state respectfully requests this Court to affirm the district court's judgment of conviction.

DATED this 8th day of April 2015.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 8th day of April 2015 served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDERS

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General